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By-Reutter, E. Edmund, Jr.

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An authority in the field of school law examines the developing attitudes of the courts relative to various legislative and executive approaches to defacto school segregation. The focus of analysis is completely objective--what the current status of the law is since the Brown decision. (NH)

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Professor E. Edmund Reutter of Teachers College, a noted authority in the field of school law, examines the developing attitudes of the courts relative to various legislative and executive approaches to de facto segregation. He is scrupulously careful to avoid any interjection of personal opinion, so that the reader is afforded access to the nub of the reasoning of the courts without any attempt to utilize that reasoning to support a particular view regarding how the situation should be handled.

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THE LAW, RACE, AND SCHOOL DISTRICTING

E. Edmund Reutter, Jr., Professor of Education,
Teachers College, Columbia University

The purpose of this presentation is to analyze the existing situation relative to "de facto segregation." No attempt will be made to evaluate the wisdom of the actions which have been reviewed by the courts, or of the reasoning offered by the courts to support their holdings. Predictions as to the future course of the law will also be avoided. The single goal is to synthesize the current status of the law--what the law is. What the law should be, or what it may become in the future will not be treated.

"De facto segregation" is a term which has only recently entered the vocabulary of America. It has, however, in a relatively few years become generally accepted as referring, in the public-school context, to a situation where the students in a school building are overwhelmingly Negro; and where this situation came about through no governmental requirement or encouragement. The term is used in contrast to "de jure segregation", which describes the pattern of racial separation which prevailed uniformly,

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prior to 1954, in seventeen states and the District of Columbia; and in four other states on a local option basis. In these jurisdictions, state constitutions and/or statutes expressly provided that Negro students be placed in schools different from those housing white students. When the United States Supreme Court in 1954 "conclude[d] that in the field of public education the doctrine of 'separate but equal' has no place . . . , [and that] separate educational facilities are inherently unequal," the court ruled out de jure segregation forever, and the country was subsequently faced with two types of de facto segregation.

Various schemes used in the South to "desegregate" the formerly de jure segregated schools have created a type of de facto segregation which is completely different legally from that outside of the South. As of this moment, entirely different bodies of law relate to the problems of school districts in the South regarding mixing the races, and to school districts outside of the formerly de jure segregated states.

The current law for formerly de jure jurisdictions is that it is necessary to completely break down all aspects of the old dual system--both as to actual mixing of races and as to community assumptions that a school is "Negro" or "white"--before there can be a constitutionally equal opportunity to obtain an education regardless of race. This summarizes the "affirmative duty" obligation of school authorities for the "de-de jure" type of "de facto"

segregation--which is not the focus of this paper.

As of the present there stands only one direct judicial holding that school districts have an affirmative duty to correct racial imbalances not of government's making. [Some dicta to this effect were offered by the Supreme Court of California in 1963, but implications have not been subsequently clarified. Also a District of Columbia federal district court opinion in 1967 touched on the point as part of a complicated case.] That one ruling came from a federal district judge whose 1964 decision was not appealed. On the other hand, over the period of the last five years the courts of appeals of four federal circuits have expressly not found an affirmative duty for school boards to reduce de facto segregation per se. As recently as the 1967-8 Term, the Supreme Court of the United States has declined to review such holdings.

It is important to recall that when the Supreme Court struck down de jure segregation in public schools in 1954, the intent was that any governmental action which had separated the races would have to be corrected--or, at least, cease to be enforced. Thus, any action by a school board to gerrymander school attendance lines, or to follow different policies for transfers of white students, would be a basis for corrective action. The key legal case along these lines came from New Rochelle, New York. This was a long-drawn-out situation, extending over a period of many years. The court proceedings, which came as a climax to

the community controversy, also were quite complicated and extended. The break came in the decision of Federal Judge Kaufmann, in January of 1961, when he found that the board of education in New Rochelle had realigned certain school district boundaries in the past; and had, before 1949, permitted transfers of white pupils--but not of Negro ones--living within the area of the school under controversy. This school was 93% Negro.

Based on this finding of fact (and strongly reprimanding school authorities) Judge Kaufman followed the procedure of the United States Supreme Court in Brown and ordered the school board to present to the court a plan for desegregation of the school. Aspects of the case were eventually appealed to the door of the Supreme Court, which declined to review.

Actually, of course, the New Rochelle case was one of surreptitious de jure segregation. The situation was not solely the result of a neighborhood school plan and housing patterns. I must emphasize the finding of the facts of gerrymandering and discriminatory transfers.

As noted previously, courts of appeals in four federal circuits have held to the view that if a neighborhood school policy is utilized throughout a school system; if the boundaries are drawn on the same criteria throughout the district; if transfer policies are non-discriminatory in nature; and if transfers are non-discriminatorily administered; then there is no further duty upon a board of

education under the common law, or under the federal Constitution, to provide an education whereby Negro and white children can mingle in appropriate numbers.

The first case so to hold in a federal appellate court was from Gary, Indiana, in 1963. There the district court and the court of appeals examined in detail the factors which the school board had used in establishing school boundary lines--factors such as density of population, distances traveled, and safety. The district judge held that the law did not require "a school system developed on the neighborhood school plan, honestly and conscientiously constructed with no intention or purpose to segregate the races, . . . [to] be destroyed or abandoned because the resulting effect is to have a racial imbalance in certain schools where the District is populated almost entirely by Negroes or whites . . . ."

Shortly after the Gary decision, the Court of Appeals of New York enunciated for the first time through the voice of a court of last resort within a state the legal principle that a local school board has an implied power to correct racial imbalance if it so desires. The court took pains to point out that it was not answering the question of whether there was an affirmative constitutional obligation to take action to reduce de facto segregation. It emphasized that it was considering the question, "May (not must) the schools correct racial imbalance?" The court's opinion relied heavily on the fact situation, which involved zoning for a

new public school where the zoning was found to be not "forced solely by racial considerations." The court posed and answered negatively the question, "Does an otherwise lawful and reasonable districting plan for a newly instituted school become unlawful because it is intended to, and does, result in an enrollment which is one-third Negro, one-third Puerto Rican, and one-third non-Puerto Rican white?" This was the first venture of a high state court into this area, and the court tread lightly in terms of keeping its statements narrow.

Subsequent to this case, the Court of Appeals of New York has extended the law markedly in relation to the elimination of de facto segregation along two lines. Both are based on the fact that the Board of Regents (state board of education) and the State Commissioner of Education have declared, as a matter of educational policy, that integrated education is better than segregated education. A series of cases has been decided on the reasoning that--because this is basically an educational determination--the courts can neither substitute their judgment for that of the educational authorities, nor inquire into the social and psychological bases of that educational judgment. Thus, in one line of cases, New York courts have consistently supported directives of the Commissioner to local districts requiring local boards to correct de facto segregation. The second line of cases in New York involves situations where local districts, to improve their educational systems, have

voluntarily tried to work out arrangements not mandated by the state-level authorities. These, too, have uniformly been upheld. Included is a plan whereby some children from one school district were bussed into a neighboring school district (with the tuition being paid by the sending district) in order to effect better racial balance within the city, and to give the white children in the suburban area an opportunity to associate with Negroes.

The Supreme Court of New Jersey has taken the position that school authorities have the duty to provide equal educational opportunities for all, and that when the elimination of racial imbalance will promote such equality, if local school authorities do not act, the State Commissioner can require them to. Purely local initiative by boards of education to correct racial imbalance for educational reasons has been judically supported in several other jurisdictions.

Legislatures of a small number of states have passed statutes either requiring or expressly permitting local boards to do something to correct de facto segregation. Two of these state statutes have been contested in the highest courts of the states; and the state courts reached opposite conclusions a few days apart in June of 1967. The Supreme Judicial Court of Massachusetts unanimously upheld a Massachusetts statute related to correcting racial imbalance; whereas the Supreme Court of Illinois, with two dissents, overturned a not dissimilar Illinois statute.

The Illinois opinion, however, was not filed. In January of 1968 the Supreme Court of the United States dismissed an appeal from the Massachusetts decision, thereby weakening part of the reasoning of the Illinois majority--that any racial classification was barred by the Fourteenth Amendment. (Other problems with the statute related to matters not germane to this paper.) After rehearing, on May 29, 1968, the Supreme Court of Illinois by a 4 to 3 vote upheld the statute as within the power of the legislature. The Illinois statute said in part, "As soon as practicable, and from time to time thereafter, the [local school] board shall change or revise existing [attendance] units or create new units in a manner which will take into consideration the prevention of segregation and the elimination of separation of children in public schools because of color, race or nationality."

The Massachusetts statute required local school boards to submit statistics annually, showing the percentage of non-white pupils in all public schools, and in each school of the district. Further, whenever racial imbalance existed in a public school, the local school board would have to prepare a plan to eliminate the imbalance. The term racial imbalance was defined as "a ratio between non-white and other students in public schools which is sharply out of balance with the racial composition of the society in which non-white children study, serve, and work. For the purpose of this section, racial imbalance shall be deemed to exist when the per cent of non-white students in any

public school is in excess of fifty per cent of the total number of students in such school." Said the Massachusetts court in sustaining the act, "It would be the height or irony if the racial imbalance act, enacted as it was with the laudable purpose of achieving equal educational opportunities, should, by prescribing school pupil allocations based on race, founder on unsuspected shoals in the Fourteenth Amendment."

It was noted earlier that there was one standing federal district court holding which came close to declaring de facto segregation per se unconstitutional. In this case, decided in 1964, the Board of Education of Manhasset--an affluent New York suburb--was sued by several Negro minors claiming that they and the members of their class were discriminated against by being racially segregated from other children in the public schools of the district. The facts were that 100% of the Negro elementary school children were contained in one school separate and apart from 99.2% of the white elementary school children. Further, the number of children in the "Negro" school was only 166, whereas the other two elementary schools contained 600 and 574 students, respectively. The school district had continued a long-standing, rigid, neighborhood school policy; and there was no proof that there had been any abuse of the companion policy not to permit transfers under any circumstances. The judge found that "on the facts of this case, the separation of the Negro elementary school children is

segregation. It is segregation by law--the law of the School Board. In the light of the existing facts, the continuance of the defendant Board's impenetrable attendance lines amounts to nothing less than state imposed segregation." The court, in buttressing its decision further, found that the plaintiffs were injured by the segregation. The court noted marked differentiations in socio-economic levels and in both achievement and intelligence quotients between students in the predominantly Negro school and students in the all-white schools. Regrettably from a clinical legal point of view, but happily for the Negro plaintiffs, the school board decided not to appeal this decision. It abolished the Negro school and reassigned the Negro pupils.

In another case, a federal district court in Springfield, Massachusetts, in dealing with a complicated fact situation stated in its opinion, "There must be no segregated schools." On appeal, the Court of Appeals for the First Circuit expressly struck out this statement. By the time of the appeal, however, the politics of the matter had become complex. The Court of Appeals found that the school board was making efforts to correct imbalances and that if it were able to complete what it had started, the courts would not be called upon to resolve "what is, at best, a doubtful question of constitutional law."

In a widely publicized 1967 Washington, D. C., case, Circuit Judge Wright, sitting as a trial judge, ordered extensive changes related to race in the school system. He

was careful, however, not to rule out *per se bona fide de facto* segregation. In his words, "The basic question presented is whether the defendants, the Superintendent of Schools and the members of the Board of Education, in the operation of the public school system here, unconstitutionally deprive the District's Negro and poor public school children of their right to equal educational opportunity with the District's white and more affluent public school children." His answer was affirmative. It is exceedingly important to note the linking of a socio-economic factor with the race factor in this case. The court examined in great detail (135 pages) factual points related to expenditures, facilities, and teachers. He found a zoning pattern and teacher segregation to be *de jure* segregation and therefore unconstitutional. He found many inequalities which were not rationally explainable in his view. He found that the "track" system of ability grouping, which had brought the defendant superintendent of schools to national fame, stigmatized early in their lives--inappropriate aptitude testing procedures--children in the lower socio-economic group, which group happened to be predominately Negro. He concluded that "even in concept the track system is undemocratic and discriminatory . . . . Any system of ability grouping [even if the tests used were more valid] which, through failure to include and implement the concept of compensatory education for the disadvantaged child or otherwise, fails in fact to bring the great majority of children into the

mainstream of public education denies the children excluded equal educational opportunity and thus encounters the constitutional bar." The board of education declined to appeal the decision and refused to allow the superintendent to appeal. He then resigned, and is appealing on his own, as is one member of the board. He is supported by the American Association of School Administrators in his view that the court went too far into educational policy matters in its far-reaching decree as to remedies; and is opposed in his view by the National Education Association. (The intriguing relationship to the case of the AASA and the NEA is not relevant to the law of de facto segregation, so will not be dealt with here.)

Another emerging aspect of the area of de facto segregation relates to teacher assignment--assigning Negro teachers to predominantly Negro schools and white teachers to predominantly white schools. In the South, where this had been the official practice under de jure segregated systems, the courts since 1965 have been requiring that steps be taken to desegregate the faculties as well as the students. However, as indicated earlier, the law for the South is different than for the North due to the legal necessity of breaking down the former dual school system. The question of forced assignments of already employed white teachers to de facto segregated schools has precipitated much controversy in professional and political circles. The first case to reach a high court dealing

directly with this matter was that decided by the Supreme Court of Kansas in July, 1967. The issue was somewhat narrow. It was the question of whether the Board of Education of Kansas City could be compelled to transfer teachers on a basis of race in order that the faculties be better integrated. The Board of Education, supported by the Kansas City Teachers' Association, declined to make such involuntary transfers. The Supreme Court of Kansas sustained the school board's posture. A general anti-discrimination statute in Kansas was found not to apply except regarding hiring, and there the board was proceeding legally in filling vacancies without regard to race. It is important to emphasize that this was not a case of the school board's desiring to move the teachers on the basis of race to get a better balance, but was a case of the school board's unwillingness to act. The question was whether it could be compelled to act; not whether it could be stopped if it proposed to act. The latter question has not, as of this date, been adjudicated.

A final case from Pennsylvania treats many of the preceding points, plus that of the possible authority of special administrative agencies charged with responsibilities related to race relations. Last fall the Supreme Court of Pennsylvania found that the Pennsylvania Human Relations Commission did have the authority to order a school district to reduce de facto segregation even though the neighborhood school pattern would be affected. The court held that for

the Commission to invoke its authority it was not necessary to find that the school district had intentionally fostered and maintained segregation, only necessary to find there was in fact an imbalance. The court added the observation that a "neighborhood school, which encompasses a homogeneous racial and socio-economic grouping, as is true today, is the very antithesis of the common school heritage." (The Commission's order for correction of specific acts of discrimination by authorities of the Chester School District had been sustained throughout the three levels of court review. These were: sending only Negro teachers and clerks to all-Negro schools; failing to make kindergartens available in sufficient number to accommodate Negro children living in Chester; and permitting the physical conditions of all-Negro school buildings to be inferior to that of other school buildings in the system.) The key questions for the highest court in Pennsylvania were whether a general order regarding de facto segregation could be issued by the Commission, and "whether the record supports the Commission's finding that the neighborhood school system as applied in Chester violates the Pennsylvania Human Relations Act." The court answered both questions affirmatively.

It is necessary to reemphasize that the foregoing presentation has been an effort to describe the law as it now stands. I have avoided predictions as to what it will be, and preachments as to what it should be. I have eschewed any bending of judicial decisions to fit socio-

logical, political or moral argumentation. My assignment was to be an analyst, not a prophet or an advocate.